Supreme Court, U. S.
FILED
MAR 30 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1231

CITY OF CLEVELAND,
Petitioner,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY and SQUIRE, SANDERS & DEMPSEY,
Respondents.

BRIEF OF RESPONDENT, SQUIRE, SANDERS & DEMPSEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MICHAEL R. GALLAGHER, ESQ.
ALAN M. PETROV, ESQ.
GALLAGHER, SHARP, FULTON, NORMAN & MOLLISON
630 Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310

Attorneys for Respondent Squire, Sanders & Dempsey

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
Table of Authorities	II
QUESTIONS PRESENTED	1
INTRODUCTORY STATEMENT	1
THE FACTS	3
REASONS FOR DENYING THE WRIT	6
I. THE "TWO-COURT" RULE MAKES THE CONCURRENT FINDINGS OF THE DISTRICT COURT AND THE CIRCUIT COURT FINAL, THEREBY PRECLUDING THE GRANTING OF A WRIT OF CERTIORARI IN THE CASE AT BAR	6
II. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI IN THE CASE AT BAR, NO STATE DECISION INVOLVING A FEDERAL QUESTION IS INVOLVED AND THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE DISPOSITIVE LAW	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases	Page
Bisso v. Inland Waterways Corp., 349 U.S. 85 (1954)	9
Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1944)	9
Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948)	6
Faulkner v. Gibbs, 338 U.S. 267 (1949)	6
Fuentes v. Shevin, 407 U.S. 67 (1972)	9
Fund of Funds, Ltd. v. Arthur Anderson & Co., 567 F.2d 225 (2 Cir. 1977)	10
Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (264 (1973)	7
NCK Organization, Ltd. v. Bregman, 542 F.2d 128 (2 Cir. 1976)	11
Neil v. Biggers, 409 U.S. 188 (1972)	6
Richardson v. Hamilton International Corporation, 469 F.2d 1382 (3 Cir. 1972)	10
Rudolph v. United States, 370 U.S. 269, 271 (1962)	6
Schloetter v. Railoc of Indiana, Inc., 546 F.2d 706 (7 Cir. 1976)	11
Wilson P. Abraham Construction Corporation v. Armco Steel Corporation, 559 F.2d 250 (5 Cir. 1977)	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1231

CITY OF CLEVELAND,
Petitioner,

v.

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY and SQUIRE, SANDERS & DEMPSEY,
Respondents.

BRIEF OF RESPONDENT, SQUIRE, SANDERS & DEMPSEY, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

QUESTIONS PRESENTED

I. Does Application of the "Two-Court" Rule Preclude the Granting of the Petition for Writ of Certiorari in the Case at Bar?

II. Are There Special or Important Reasons for the Granting of a Writ of Certiorari in the Instant Case?

INTRODUCTORY STATEMENT

The City of Cleveland, petitioner herein, while contending that questions of law, not questions of fact, are at issue before this Court, references the record of the testi-

mony at trial and not the findings in the trial court's opinion to support its statement of the case. Petitioner, moreover, attempts to establish with such testimony facts which are rejected by the trial court in its own findings (Petitioner's Brief, 4-6). Petitioner's statement is additionally misleading in that it quotes language from the trial court's opinion intended to describe bond counsel's duties generally, and by omissions (App. 14a) [1] and deft use of self-serving testimony of petitioner's witnesses taken from the trial record, suggests inferential facts wholly inconsistent with the sum of the evidence adduced by the parties and the findings of fact drawn therefrom by the District Court.

The District Court findings of fact are embodied in its opinion which is attached to the Petition for Writ of Certiorari (App. 5a-45a). They were adopted by the Court of Appeals (App. 1a), and as a consequence of the City's Petition for Rehearing in the Circuit Court, were examined a second time by the Circuit Court, and for a second time were found supported by substantial evidence (App. 3a-4a).

Accordingly, it is the District Court's findings of fact, as confirmed by a review of the record on two separate occasions by the Circuit Court, to which we must refer to determine what legal issues, if any, are presented on this Petition for Writ of Certiorari. It is the respondent's position that there are *no* issues of law presented to this Court; rather, that when correctly analyzed, petitioner is simply urging this Court to draw different factual inferences from the record from those drawn by the District Court and affirmed by the Circuit Court.

---

[1] The references are to the Orders of the District Court and Circuit Court of Appeals which are appended to the Petition for Writ of Certiorari.

THE FACTS

Briefly stated, the facts found by the District Court and affirmed as having substantial support in the evidence by the Circuit Court are as follows:

Squire, Sanders & Dempsey (SS&D), the respondent herein, has represented the Cleveland Electric Illuminating Company (CEI) since its incorporation in 1890 and has openly, notoriously and without interruption served CEI as outside counsel for over 65 years (App. 9a). The City had knowledge of this intimate relationship between SS&D and CEI. Two of SS&D's partners served on the Board of Directors of CEI. One of SS&D's partners is a past President of CEI (App. 4a, 10a). The relationship between CEI and SS&D was a matter of public knowledge in Cleveland and was known to the City and its legal department, which consists of a Director of Law and 30 assistants (App. 4a). The District Court summarized its finding with respect to the relationship as follows:

> The Court is here constrained to interject that, from the evidence taken in its entirety, reasonable minds can arrive at but one conclusion: from the open, notorious and continuous legal representation provided by SS&D as general outside legal counsel to CEI, adversary to the entire world including the City for 65 years, viz., that the City was fully cognizant of the scope and depth of any potential conflict of interest that could attach to SS&D's services to the City as a bond consultant. (App. 19a)

The Municipal Electric Light Plant (MELP) is an electric utility and is operated by the City in direct competition with CEI (App. 10a). In all general respects, it is considered to be similar to a privately owned and regulated electric utility and is structured as an independently operating, self-contained, proprietary entity maintaining

a system of audits and accounts independent of the City of Cleveland. (App. 11a). During the last 30 years, a number of Cleveland's major law firms, including SS&D, have served the City and MELP on an *ad hoc* basis. However, MELP is legally represented and counseled by the City's Law Department, and the Law Department's representation of MELP is analogous to SS&D's representation of CEI (App. 11a). MELP's limited relationship with SS&D since 1963 had been with John Brueckel, a partner in the Bond Department of the Public Law Section of SS&D (App. 12a). Anent this point, the District Court said:

> It is noteworthy, however, that although SS&D accepted ad hoc retainers from the City, it scrupulously avoided any relationship with MELP, apart from its bond consultations, except to openly oppose it as advocate for its client CEI in rate and service controversies and other adversary proceedings before the PUCO and the courts. (App. 12a)

As respects alleged confidential disclosures, the Court found that they were "unsupported by evidence and completely misconceived" (App. 16a) or related to public information (App. 14a).

Because the City was having difficulty with the issuance of its bonds in 1972 (which issue had been handled by other counsel) and because of SS&D's acknowledged eminence in the field, the City "importune[d] SS&D to take over the mess and straighten it out" (App. 4a). SS&D was reluctant to do so, in part because of the City's prior expressed concern over a possible conflict situation (App. 17a), but finally acceded only after receiving express permission from CEI (App. 18a) and after receiving a written request to do so signed by the City's Law Director and the Director of Public Utilities (App. 19a, 25a; Defendant's Exhibit 11). SS&D's services with respect to the 1972 bond issue were provided solely

by John Brueckel and were limited to the drafting of Ordinance No. 2104-72. Brueckel made no inquiry into MELP's debt structure or its financial condition and was not required to undertake the tasks otherwise incumbent upon him had his responsibility been greater than the authorship of the ordinance alone (App. 12a-15a).

A full hearing was provided the parties on the petitioner's Motion for Disqualification. The hearing covered three days. Nine witnesses testified. In addition, an affidavit of a tenth witness was filed, and voluminous exhibits were offered and received. The hearing was preceded by exhaustive discovery and by multiple evidentiary hearings before the Nuclear Regulatory Commission on the same issue, which had the salutory effect for the City of providing it with ample opportunity to secure additional discovery and to refine its legal thinking and evidentiary points. It cannot be suggested that procedural due process was not provided both petitioner and respondent.

After careful consideration, the District Court prepared a painstaking opinion (App. 5a-44a). Upon appeal, the Circuit Court found procedural due process to have been afforded the parties in a full evidentiary hearing (App. 1a), found that the order of the District Court was supported by substantial evidence and found that the District Court's conclusions of law were correct (App. 1a-2a). Subsequently, the City filed a Petition for Rehearing with a suggestion that the hearing be en banc. No active judge requested a vote be taken for an en banc hearing, so the petition was referred to the panel, which upon consideration, reaffirmed its opinion that the City's Motion to Disqualify SS&D was without merit. In reviewing the record in connection with the Petition for Rehearing, the Circuit Court specifically found that the City importuned SS&D to represent it and that it should be estopped from claiming disqualification. The Circuit Court expressly

held, moreover, that there was no substantial relationship between the subject matter of SS&D's prior representation and the subject matter of the litigation currently before the Court (App. 4a).

REASONS FOR DENYING THE WRIT

I.

THE "TWO-COURT" RULE MAKES THE CONCURRENT FINDINGS OF THE DISTRICT COURT AND THE CIRCUIT COURT FINAL, THEREBY PRECLUDING THE GRANTING OF A WRIT OF CERTIORARI IN THE CASE AT BAR.

The "two-court" rule, which makes the concurrent findings of the two courts below final in the absence of a very exceptional showing of error has been described repeatedly as "seasoned and wise." *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211 (1948). In that case, as in the instant case

> Much of petitioner's argument seems . . . to invite us to reach conclusions from the voluminous record in the case, contrary to those reached by the two courts below. 335 U.S. at 213.[2]

In refusing to do so, the Court held that it was concluded by the concurrent findings of the District Court and Circuit Court and dismissed the Writ of Certiorari.

The cases cited in *Comstock* (see 335 U.S. at 214), and the cases which subsequently cite it as precedent, confirm its initial vigor and its continuing vitality. *Falkner* v. *Gibbs*, 338 U.S. 267 (1949); *Rudolph* v. *United States*, 370 U.S. 269, 271 (1962); *Neil* v. *Biggers*, 409

[2] The Court continued, "This we cannot do. A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. [Citations omitted]" 335 U.S. at 213-214.

U.S. 188 (1972)[a]; *Keyes* v. *School District No. 1, Denver, Colorado*, 413 U.S. 189, 264 (1973).

Petitioner's *ipse dixit* characterization of the issues presented by its Petition as being ones of law and not of fact does not make them so. This case was disposed of in the lower court on four separate independent factual bases. Respondent's first legal defense was estoppel. The law germaine to it is set forth with clarity in the District Court's Opinion (App. 23a-25a). There is no contention whatsoever that the law on this issue as announced by the District Court and approved by the Circuit Court is in conflict with the law of any other circuit. This is a fatal defect, for estoppel is absolutely dispositive of the case. The District Court made specific findings of fact with respect to the four elements comprising this defense (App. 25a-26a), and the Court of Appeals, both at the time of the initial hearing and at the time of the Petition for Rehearing, addressed itself to these findings of fact and found substantial evidence to support them (App. 1a, 3a-4a).

As respects the issue of waiver, the second ground upon which the District Court denied petitioner's Motion for Disqualification, we again find that the petitioner

[3] This further elaboration is perhaps helpful:

> The "two-court" rule, however, rests upon more than mere deference to the trier of fact who has a firsthand opportunity to observe the testimony and to gauge the credibility of witnesses. For the rule also serves as an indispensable judicial "time-saver," making it unnecessary for this Court to waste scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved. . . . And although we might reasonably disagree with the lower courts' findings as to such matters, the "two-court" rule wisely inhibits us from cavalierly substituting our own view of the facts simply because we might adopt a different construction of the evidence or resolve the ambiguities differently (Dissenting Opinion, 409 U.S. at 203-204).

does not seriously suggest there is any conflict among the circuits. The well-established law on waiver is set forth in the District Court's Opinion (App. 26a-27a). The pertinent findings of fact are also contained on those pages of the Opinion with further supporting findings of fact in the introductory portions of the Opinion (App. 10a-23a). Petitioner's argument respecting waiver is, in the final analysis, nothing more than a factual argument which consists of taking testimony from the trial record out of context and weaving it into a self-serving pattern from which petitioner asks the Court to draw inferences of fact favorable to it but entirely inconsistent with those drawn by the trial court and concurred in by the Court of Appeals. It is precisely this kind of needless regurgitation which presumes of the Court's time and which the "two-court" rule seeks to avoid.

The District Court further found from the facts that the parties were not adverse as respects the bond issue employment and that there was no substantial relationship between the limited bond work done for MELP and SS&D's representation of CEI in the case at bar. These findings were based upon an extensive hearing record.[4]

Finally, the Court found that there was, *in fact*, no communication of confidential information to SS&D. Petitioner contends that there may have been by operation of law, but this question will not be reached here because petitioner's Motion below was disposed of on four prior grounds, each of which individually supports the rulings of the District Court and the Circuit Court.

---

[4] In this regard, the Circuit Court's Order stated:

> The District Court, prior to ruling on the motion for disqualification, allowed extensive discovery to the City, which included interrogatories, production of records, depositions, and an evidentiary hearing where witnesses were interrogated at length, briefs were submitted, and oral arguments were made.
>
> * * * *
>
> We are also of the opinion that the District Judge's protective order was justified (App. 1a, 2a).

II.

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI IN THE CASE AT BAR. NO STATE DECISION INVOLVING A FEDERAL QUESTION IS INVOLVED AND THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE DISPOSITIVE LAW.

There is no conflict among the circuits respecting the dispositive law of this case. As respects estoppel, the principal ground upon which the District Court and Circuit Court denied the Motion for Disqualification, no mention at all is made in the Petition of a conflict (Petitioner's Brief, 16).

Waiver, the second ground fully dispositive of the petitioner's motion below, similarly finds no conflict among the circuits. It is true that the petitioner cites three cases in discussing this legal principal, but all are inapposite and reveal the sham of the assertion of conflict (Id.). For example, *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) deals with procedural due process and the waiver of one's procedural due process rights; in question were provisions in a printed contract permitting the repossession of purchased property without a hearing. *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1944) involved an employee's right to liquidated damages under the Fair Labor Standards Act. The Court was "of the opinion that the same policy considerations which forbid waiver of basic minimum and overtime wages under the Act also prohibit waiver of the employee's right to liquidated damages." (324 U.S. at 707). *Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1954) considered the question of whether a tow boat owner may validly contract against all liability for his own negligent towage. The Court decided the question under admiralty law and as a matter of public policy held invalid contracts releasing towers

from all liability for their negligence. (349 U.S. at 85, 89). It is clear that none of the foregoing cases is germaine to the legal issue of waiver in the context of disqualification.

In a further effort to establish a purported conflict, petitioner argues that the courts below, by holding that no substantial relationship existed between the subject matter of the instant anti-trust litigation and the prior bond ordinance service, rejected "the rule" followed by other circuits. It then cites *Fund of Funds, Ltd.* v. *Arthur Anderson & Co.*, 567 F.2d 225 (2 Cir. 1977) as the conflicting authority from another circuit (Petitioner's Brief, 13). *Fund of Funds* arose from exceedingly complex facts involving multiple securities transactions, and, if anything, it underscores the need to treat disqualification cases on an *ad hoc* basis with great deference to their factual distinctions. In *Fund of Funds*, the law firm whose disqualification was sought represented the movant in general legal matters for a period of 15 years. In the course of the law firm's investigation into securities violations on behalf of another client, it knew the investigation might implicate the movant, whom it continued to represent. After a serious of attempts by the law firm to extricate itself from the dilemma, including an effort to secure the movant's consent to the representation which was refused (567 F.2d at 230), the law firm referred the matter to another firm that had been prepared to proceed with the litigation and with whom the offending firm continued to cooperate. One cannot seriously argue with the result in the case, but the result turned upon *facts* not remotely similar to the facts in the case at bar and did not involve estoppel or waiver, the threshold issues in the instant case.

Richardson v. *Hamilton International Corporation*, 469 F.2d 1382 (3 Cir. 1972), similarly does not support the petitioner's assertion of a conflict among the circuits

(Petitioner's Brief, 14). The trial court in that case, affirmed by the Circuit Court, found that the representations by counsel were substantially related, a factual finding contrary to the factual finding in the case at bar.

NCK Organization, Ltd. v. *Bregman*, 542 F.2d 128 (2 Cir. 1976); *Wilson P. Abraham Construction Corporation* v. *Armco Steel Corporation*, 559 F.2d 250 (5 Cir 1977); and *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7 Cir. 1976) (Petitioner's Brief, 15), similarly provide no comfort to the petitioner in its efforts to demonstrate a conflict. In each, the distinctions are factual in character, not legal. In *NCK Organization, Ltd.*, the question was whether a law firm might represent a corporate officer against his former corporate employer when the law firm had consulted with the corporation's former house counsel on the subjects at issue in the lawsuit. It was the undisputed evidence that house counsel was clearly disqualified and that he had engaged in an extensive discussion of the case with the law firm giving advice to that firm and to the corporate officer (542 F.2d at 136). In *Wilson P. Abraham Construction Corporation*, the Court found that the matters in controversy were substantially related and that the attorney engaged in conferences in which confidential exchanges of information took place between the various co-defendants in preparation for a joint defense (559 F.2d at 250). In *Schloetter*, the Court found the representation to be adverse and the subject matters of the representation to be substantially related. Having so found, it saw no need to inquire into whether confidential information had passed, and in any event, it concluded that it should not upset the lower court's finding that the evidence of the attorneys was insufficient to rebut a presumption that confidential information had passed under the circumstances (546 F.2d at 707, 711).

Clearly, none of the cases cited by the petitioner support its assertion of a conflict among the circuits. Even

if it is assumed that the cited cases may be tortuously construed into suggesting a minor conflict, this conflict would never be reached on the merits, for the issues of waiver and estoppel, which are dispositive of the motion below, are clearly without conflict.

CONCLUSION

After a full hearing, the District Court, twice affirmed by the Circuit Court, found on a series of independent factual grounds that the petitioner's Motion for Disqualification should be denied.

Under the circumstances, the "two-court" rule precludes the issuance of a writ of certiorari.

Moreover, there is no conflict among the circuits on the law relating to the independently dispositive grounds of the District Court's denial of the Motion.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL R. GALLAGHER, ESQ.
ALAN M. PETROV, ESQ.
GALLAGHER, SHARP, FULTON,
NORMAN & MOLLISON
630 Bulkley Building
Cleveland, Ohio 44115
(216) 241-5310

Attorneys for Respondent
Squire, Sanders & Dempsey

March 30, 1978